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No. 83-124

IN THE

Supreme Court of the United States

October Term, 1983

NUNZIATO FUSARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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November, 1983

TABLE OF CONTENTS

A. The Issue Involving the Construction of 18 U.S.C. Sec. 1005 1

B. The Prejudiced Juror Issue 4

TABLE OF AUTHORITIES

Cases

Harrison v. *United States*, 279 F 2d 19 2

Ramirez v. *United States*, 318 F 2d 155 2

Remmer v. *United States*, 347 U.S. 227 4

Smith v. *Phillips*, 455 U.S. 209 5

United States v. *Carroll*, 582 F. 2d 942 3

United States v. *Denmon*, 483 F. 2d 1093 3

United States v. *Docherty*, 468 F. 2d 989 1

United States v. *Moraites*, 456 F. 2d 435 2

United States v. *Morrison*, 586 F. 2d 286 3

United States v. *Pollack*, 503 F. 2nd 87 1,2

United States v. *Smith*, 553 F. 2d 1239 3

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A. The Issue Involving The Construction Of 18 U.S.C. Sec. 1005

The primary issue presented to this Court by Petitioner, which has remained unblurred, despite Respondent's strenuous efforts, is, simply put:

> "Does the federal crime of issuing an unauthorized bank draft, under 18 U.S.C. Sec. 1005, require proof of an 'intent to injure or defraud' the bank?"

The Second and the Ninth Circuits say yes. *United States* v. *Docherty*, 468 F. 2d 989, 994-5 (2d Cir. 1972); *United States* v. *Pollack*, 503 F. 2d 87, 90-91 (9th Cir. 1974).

The Fifth Circuit says no. *Harrison* v. *United States*, 279 F. 2d 19, 23 (5th Cir. 1980).

The First Circuit apparently does not want to get involved but, at the same time, sustained the Petitioner's conviction on a theory that Sec. 1005 does *not* require an intent to injure or defraud the bank.

The policy agenda underlying all three subdivisions of Sec. 1005 seems clear – "intent to injure or defraud a bank" should be the sovereign ingredient in each subdivision, i.e., (1) issuing a note without proper authority; (2) issuing a bank draft without proper authority; or (3) making a false entry in any of the bank's books.

What possible reasoning would support making intent to injure or defraud a bank an essential element of falsifying a bank report, but withholding that rationale from issuing an unauthorized bank draft or note?

Respondent attempts to defeat this petition solely by arguing that the language in the indictment that Petitioner acted "knowingly, unlawfully and wilfully" somehow embraces the much more specific mental element of "intent to injure or defraud a bank." To support this unorthodox view Respondent relies on *United States* v. *Moraites*, 456 F. 2d 435 (3rd Cir. 1972), and *Ramirez* v. *United States*, 318 F. 2d 155 (9th Cir. 1963).

Moraites supports the Petitioner's position because there the indictment actually charged the defendent with "intent to injure and defraud the Midland Bank." 456 F. 2d 440 n. 7.

The authority of *Ramirez* has been substantially undercut by the case Petitioner relies on, *United States* v. *Pollack*, 503 F. 2d, *supra*, which holds that intent to injure or defraud a bank is an indispensable element of all three subdivisions of Sec. 1005. Significantly, the Ninth Circuit recognized the depreciation of

the rule originally announced by *Ramirez* in *United States* v. *Morrison*, 586 F. 2d 286 (9th Cir. 1976), by holding:

> "We note in passing that the 'intent to injure or defraud' a bank, at issue in *Pollack* and *Ramirez*, is a specific intent, which should be specified with greater particularity than a general intent." 586 F. 2d at 288.

Surely, this carefully measured language is lethal in its implications to the Respondent's claim in this Court. There is not a trace of responsible legal authority supporting the claim that the use of the word "wilfull" in an indictment includes the particularized "intent to injure or defraud."

Consequently, we're back where we began. If "intent to injure and defraud" is an essential of every offense specified in Sec. 1005, then the indictment is deficient, and such a jurisdictional failure cannot be overcome by a general allegation of intent. And if the indictment should have alleged a special brand of intent, i.e., "to injure or defraud a bank," no amount of instruction to the jury or lack of prejudice to the defendant or finding of harmless error can rescue it. *United States* v. *Denmon*, 483 F. 2d 1093, 1097 (8th Cir. 1973); *United States* v. *Smith*, 553 F. 2d 1239, 1242 (10th Cir. 1977); *United States* v. *Carroll*, 582 F. 2d 942, 944 (5th Cir. 1978).

The special element of "intent to injure or defraud" a bank is a unique form of criminal intent. For instance, a person may specifically intend to issue a bank draft without proper authority, but still believe that the loan ultimately will *benefit* the bank. Thus, intent to injure the bank would be a powerful defense against a charge that issuing a bank draft without proper authority violated a Sec. 1005. Clearly, the "intent to injure or defraud a bank" brand of intent provides defense counsel with an argument that is unavailable under the broader intent element of the law.

It is manifest that no amount of sophisticated discussion concerning the facts of the *Fusaro* case will make this crucial issue

of statutory construction go away.* It is now firmly entrenched in Sec. 1005 and should not be allowed to fester unresolved. This case provides an appropriate vehicle for its resolution. No purpose is served in postponing its disposition. For all these reasons and those stated in our opening brief the petition should be granted.

B. The Prejudiced Juror Issue

Defense counsel moved that the jury foreman – apparently prejudiced by an extrajudicial conversation with an FBI agent attached to the office of the prosecutor in this case – be replaced by an alternate. The trial judge denied the motion, although he did not examine the foreman himself to determine if there was prejudice. Respondent now argues that this was an essentially factual determination by the courts below that no prejudice occurred and, therefore, review by this Court is not warranted. Br. at 8. But it is precisely the inadequacy of the trial court's *procedure* in arriving at this "factual determination" that the Petitioner challenges as a denial of due process. This Court is asked to review the procedure *antecedent to* the trial court's factual finding. Thus review is appropriate.

Respondent also contends that Petitioner is foreclosed from complaining of the trial court's failure to conduct an examination of the foreman, because Petitioner's counsel failed to request such an examination. Br. at 8. But surely Petitioner's motion to remove the juror subsumes any request for lesser relief and presupposes all the elements essential to a fair consideration of that motion. Once Petitioner made a prima facie showing of potential for prejudice inherent in the extrajudicial contact, the onus fell on the trial court to determine, as competently as possible, the prejudicial *impact* of that contact. *Remmer* v. *United States*, 347 U.S. 227, 230 (1954). Questioning the juror

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* Respondent has inadvertedly stated that the Petitioner represented both the bank and Mr. Robidoux. This is incorrect. Petitioner never represented the bank, and the jury found him not guilty of charges based on allegations that he was the bank's attorney.

was the logical, indeed the only, way in which the trial court could discover if the foreman had actually been prejudiced. This is the procedure endorsed by this Court in *Smith* v. *Phillips*, 455 U.S. 209 (1982).* The trial court, however, was content to base its determination on the self-serving declarations of the prosecutor and the FBI agents. This is hardly an adequate basis for concluding that no prejudice existed, and the trial court's finding is therefore entitled to no weight.

For these various reasons, this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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November 28, 1983

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* Respondent contends that a district court has considerable discretion in determining the scope and nature of the investigation needed to evaluate a claim of impermissible jury contact. Br. at 8. However, the circuit court cases cited for this proposition all antedate *Smith* v. *Phillips*.